No. 12,257

IN THE

United States Court of Appeals

For the Ninth Circuit

EDWARD R. BIGGS, JOHN R. HECTOR, H. J. LUEDER and MARTIN M. MORENO,
Appellants,

vs.

JOSHUA HENDY CORPORATION,
Appellee.

BRIEF OF THE UNITED STATES IN SUPPORT OF THE CONSTITUTIONALITY OF FAIR LABOR STANDARDS ACT AMENDMENTS OF 1949, ACT OF OCTOBER 26, 1949, PUBLIC LAW 393, 81ST CONGRESS, FIRST SESSION.

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PRELIMINARY STATEMENT.

The decision of this Court dated June 28, 1950 rests upon a basis that certain sections of the Fair Labor Standards Act Amendments of 1949 might constitutionally be made retroactive by Section 16(e) of the statute.[1] In the concluding paragraph of the opinion,

[1]Sec. 16(e). "No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended (in any action or proceeding commenced prior to or on or

the Court extended to counsel an opportunity to be heard upon this question before the judgment of the Court should become final. Thereafter, by order dated July 26, 1950, the United States was granted leave to petition to intervene and file a brief on the constitutional question.

The United States petitioned to intervene because a determination that the statute is constitutional is material to the position which it has taken in defense of the action of *Duane Moss, et al., Appellants v. Hawaiian Dredging Co., et al., Appellees,* and thirty-one cases consolidated therewith, which are now pending on appeal in this Court, under Docket No. 12571, under an oral stipulation to the effect that judgment may be entered for the defendants in the thirty-two cases if the Court holds the amendatory statute to be constitutional. A similar defense has been advanced in numerous other cases defended by the United States.

SUMMARY OF ARGUMENT.

Seventeen decisions in nine Circuit Courts of Appeals, including the decision of this Court in the case of *Lassiter, et al. v. Guy F. Atkinson,* 176 F. (2d) 984, have upheld the constitutionality of the retro-

after the effective date of this Act), on account of the failure of said employer to pay an employee compensation for any period of overtime work performed prior to July 20, 1949, if the compensation paid prior to July 20, 1949 for such work was at least equal to the compensation which would have been payable for such work had section 7 (d) (6) and (7) and section 7 (g) of the Fair Labor Standards Act of 1938, as amended, been in effect at the time of such payment."

active provisions of the Portal-to-Portal Act of 1947. Certiorari has been denied in six of these cases. These decisions are dispositive of the question of the constitutionality of the Fair Labor Standards Act Amendments of 1949 if the legal issues as to constitutionality are the same under the two statutes. The situations leading up to the enactment of the two statutes, and the constitutional issues, are indeed the same, and were so recognized by the Congress.

The findings of the Congress that the situation which was to be corrected by the retroactive amendment constituted a substantial burden on interstate commerce and the free flow of goods in commerce, and that it was the congressional purpose to relieve and protect interstate commerce from practices which burden and obstruct it, bring the case within the doctrine that determination of whether need exists for congressional action in a field within the plenary power of Congress, and a decision as to the extent and efficacy of the means to be adopted, are legislative functions over which the Courts have no control except in rare and extraordinary situations such as do not exist in the present case.

Apart from the precedential significance of the Portal Act decisions, it is clear that the Fair Labor Standards Act Amendments of 1949 are not unconstitutional, since the statute is an exercise of sovereign powers under the commerce clause, falling short of an outright taking of property; and such an exercise of sovereign power is not precluded by the fact that there will result a disruption of existing contractual

relations or even a complete destruction of the benefits or value of contracts. Contracts, however expressed, cannot fetter the constitutional authority of Congress. When they deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.

This is particularly true where the rights in question are created by, and conferred on private persons by, a statute passed in the exercise of plenary powers in aid of a dominant public interest. Rights thus created are not invalidated by the fact that they may affect or be in derogation of contractual arrangements existing at the time of their creation. Similarly, legislative modification of such rights is not prohibited by the circumstance that the modification affects arrangements made pursuant to the original enactment.

THE ACT OF OCTOBER 26, 1949, PUBLIC LAW 393, 81ST CONGRESS, FIRST SESSION, COMMONLY CALLED "FAIR LABOR STANDARDS ACT AMENDMENTS OF 1949", IS CONSTITUTIONAL.

It is assumed that this Court adheres to its decision in *Lassiter v. Guy F. Atkinson Co.*, 176 F. (2d) 984, upholding the constitutionality of the Portal-to-Portal Act of 1947.[2] This disposes of problems relating to

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[2]A like result was reached in eight other circuits in the following cases:

Manofsky v. Bethlehem-Hingham Shipyards, Inc. (CCA 1), 177 F. (2d) 529;

P. L. 393 if the situation with respect to it, and the legal issues as to its constitutionality, are the same as those relating to the Portal Act.

The situations and the resulting issues are indeed the same. The following quotation from Senate Report No. 402 with respect to H. R. 858 shows that the Senate so believed and so found:[3]

> "We believe that the overtime-on-overtime claims cannot be distinguished from the claims covered by the Portal-to-Portal Act. In both cases the

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Battaglia v. General Motors Corp. (CCA 2), 169 F. (2d) 254, certiorari denied, 335 U.S. 887;
Darr v. Mutual Life Insurance Co. (CCA 2), 169 F. (2d) 262, certiorari denied, 335 U.S. 871;
Thomas v. Carnegie-Illinois Steel Corp. (CCA 3), 174 F. (2d) 711;
Seese v. Bethlehem Steel Co. (CCA 4), 168 F. (2d) 58;
Cingrigrani v. B. H. Hubbert & Son, Inc. (CCA 4), 168 F. (2d) 993, certiorari denied, 335 U.S. 868;
Fisch v. General Motors Corp. (CCA 6), 169 F. (2d) 266, certiorari denied, 335 U.S. 902;
Newsom v. E. I. du Pont de Nemours & Co. (CCA 6), 173 F. (2d) 856, certiorari denied, 338 U.S. 824;
Rogers Cartage Co. v. Reynolds (CCA 6), 166 F. (2d) 317;
Busch v. Wright Aeronautical Corp. (CCA 6), 174 F. (2d) 322;
Lee v. Hercules Powder Co. (CCA 7), 171 F. (2d) 950;
Bumpus v. Remington Arms Co. (CCA 8), July 6, 1950, 9 WH Cases 484;
Role v. J. Neils Lumber Co. (CCA 9), 171 F. (2d) 706;
Potter v. Kaiser Co. (CCA 9), 171 F. (2d) 705;
Adkins v. E. I. du Pont de Nemours & Co. (CCA 10), 176 F. (2d) 661;
McDaniel v. Brown & Root, Inc. (CCA 10), 172 F. (2d) 466.

[3]While P.L. 393 was under discussion, Congress enacted H.R. 858 as Act of July 20, 1949, P.L. 177, 81st Cong., 1st Sess. The provisions of section 1 of P.L. 177 were the same, in substance, as those of section 7(d)(6) and 7(d)(7) of P.L. 393. Section 2 of P.L. 177 was the same as section 16(e) of P.L. 393. P.L. 177 was repealed by section 16(f) of P.L. 393, which, however, reenacted its provisions as above stated. The reports and discussion as to P.L. 177 are therefore relevant to our consideration of P.L. 393.

> claims arose under the Fair Labor Standards Act and would not have existed were it not for that law; in both cases, the claims arose by reason of the failure of Congress to define a basic term in that Act—the 'workweek' in the portal-to-portal situation and 'regular rate' in this overtime-on-overtime situation; in both cases, prosecution of the claims violated the spirit of collective-bargaining agreements; in both cases, the filing of suits was deplored by responsible A. F. of L. officials; in both cases, the collection of claims would unfairly penalize employers who attempted in good faith to comply with the Wages-and-Hours law. Indeed, in every important respect the overtime-on-overtime claims closely parallel the portal-to-portal claims. In our opinion, the factual and legal findings recited in the Portal-to-Portal Act are equally applicable here, and the situation requires the same expeditious and equitable treatment by Congress."

The findings in Section 1 of the Portal Act, which were thus adopted by reference as applicable to P. L. 177, include those to the effect that the existing situation "constitutes a substantial burden on interstate commerce" and a "substantial obstruction to the free flow of goods in commerce", and that the amending statute was enacted "to relieve and protect interstate commerce from practices which burden and obstruct it".

These findings are important for the reason that the determination of whether a need exists for congressional action in a field within the plenary power of Congress, and decision as to the extent and efficacy of

the means to be adopted, are legislative functions over which the Courts have no control except in rare and extraordinary situations.

In *United States v. Darby,* 312 U.S. 100, in the course of its discussion upholding the constitutionality of the Fair Labor Standards Act against the charge that it unconstitutionally interfered with existing employment contracts, the Court said, at page 115:

> "The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. *McCray v. United States,* 195 U.S. 27; *Sonzinsky v. United States,* 300 U.S. 506, 513 and cases cited. 'The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged power.' "

In *Overnight Motor Co. v. Missel,* 316 U.S. 572, the employer took the position that the *Darby* case went no further than a holding that Congress could legislate against conditions detrimental to a minimum standard of living. It was argued that Congress could not constitutionally regulate rates of pay which were above such a standard, nor hours not injurious to health. The Court held, however, that the decision as to the need or efficacy of legislative enactments in aid of interstate commerce was the function of the Congress and not of the Courts, saying, at page 577:

> "If, in the judgment of Congress, time and a half for overtime has a substantial effect on these conditions, it lies with Congress' power to use it to promote the employees' well-being."

Similarly in *Bunting v. Oregon,* 243 U.S. 426, where the issue was whether a State law regulating hours of labor in mines violated the Fourteenth Amendment, the Court said, at pages 437-438:

> "But we need not cast about for reasons for the legislative judgment. We are not required to be sure of the precise reasons for its exercise or be convinced of the wisdom of its exercise. *Rast v. Van Deman & Lewis Co.,* 240 U.S. 342, 365. It is enough for our decision if the legislation under review was passed in the exercise of an admitted power of government; and that it is not as complete as it might be, not as rigid in its prohibitions as it might be, gives perhaps evasion too much play, is lighter in its penalties than it might be, is no impeachment of its legality."

It is true that where contract rights are interfered with by a legislative enactment which is justified as an exercise of the police power or solely on the basis that the contract is charged with a public interest, the recitals in the legislation are not conclusive, and the Courts can examine into the facts to see whether the legislature has transgressed the limits of its powers. But the existence of an emergency is not a condition precedent to the right to exercise the police power or constitutional powers (*Veix v. Sixth Ward Assn.,* 310 U.S. 32, 38-40); and the burden of establishing invalidity is on the attacking party (*Weaver v. Palmer Bros.,* 270 U.S. 402, 410; *Minnesota Rate Cases,* 230 U.S. 352, 452); and the Courts are without power to strike down the legislation except on overwhelming proof of complete inappropriateness and unjustifiability of the statute. The true doctrine is stated by

Chief Justice Hughes in *Norman v. B & O RR Co.*, 294 U.S. 240. After having established the basic principle that Congress may regulate the currency even at the expense of contractual commitments and rights, he came to the point now under discussion—namely, the right or power of the Courts to pass upon the need or appropriateness of the legislation. At page 311 he said:

> "Despite the wide range of the discussion at the bar and the earnestness with which the arguments against the validity of the Joint Resolution have been pressed, these contentions necessarily are brought, under the dominant principles to which we have referred, to a single and narrow point. That point is whether the gold clauses do constitute an actual interference with the monetary policy of the Congress in the light of its broad power to determine that policy. Whether they may be deemed to be such an interference depends upon an appraisement of economic conditions and upon determinations of questions of fact. With respect to those conditions and determinations, the Congress is entitled to its own judgment. We may inquire whether its action is arbitrary or capricious, that is, whether it has reasonable relation to a legitimate end. If it is an appropriate means to such an end, the decisions of the Congress as to the degree of the necessity for the adoption of that means, is final."

Continuing at page 313, he indicated the narrow limits of the Court's function in the following language:

> "Can we say that this determination is so destitute of basis that the interdiction of the gold

clauses must be deemed to be without any reasonable relation to the monetary policy adopted by the Congress?"

In the light of these pronouncements we turn to a statement of various facts which to us clearly show that the situation confronting the Congress was not so destitute of relationship to the well-being of interstate commerce as to empower the Court to interfere.

(a) Following the Supreme Court decision of June 7, 1948 in *Bay Ridge Operating Co. v. Aaron,* 334 U.S. 446, and as the date of expiration of the existing longshoremen's collective bargaining agreement in New York drew near, the employers and union found themselves unable as a practical matter to adjust the industry to the decision. A costly strike followed. A Board of Inquiry appointed by the President under the Labor Management Relations Act of 1947 reported the reality and sincerity of the impasse. A temporary arrangement was finally reached to bridge the gap until such time as remedial legislation might be enacted as recommended by the United States Department of Labor ("Hearings before Subcommittee of the Committee on Labor and Public Welfare, U. S. Senate, 81st Cong., 1st Sess. on S. 336 and H. R. 858", pp. 33-36, 554; cf. also letter of Secretary of Labor at p. 2).

(b) The same problem existed in other industries having similar types of contract (S. Rep. No. 402 on H. R. 858, pp. 5-6); and enactment of the amendment was advocated, through personal appearances or let-

ters, by a large number of industries other than longshoring. The statements and letters emphasize that clock-hour arrangements similar to that involved in the *Aaron* case exist in these other industries; that the construction placed on F.L.S.A. by the *Aaron* decision was not welcomed by either employers or employees in these industries; that attempted adjustments to meet the decision disrupted long-established and satisfactory collectively bargained agreements; that satisfactory adjustments were always difficult, and not infrequently quite impracticable; and that employers and employees had believed that their contracts met the requirements of F.L.S.A. as interpreted in Interpretative Bulletin No. 4.[4]

(c) The potential liability under the Supreme Court decision in the *Aaron* case, *supra,* was estimated as high as $300,000,000 in the longshore industry (S. Rep. 402, p. 1; and statements by Supreme Court, 334 U.S. at fn. 1, p. 454), and as "substantial" in other industries (S. Rep. 402, p. 1).

(d) Not less than 137 cases brought on behalf of longshoremen were instituted between June 1943 and

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[4]See Hearings before Senate Committee: Edison Electric Institute and other electric light and power companies (pp. 83, 117, 119, 194, 195); brewers (pp. 183, 194); Lumber Manufacturers Ass'n (pp. 181, 625); refrigerator and warehouse companies (pp. 190, 195, 613, 627); meat packers (pp. 123, 623); bakers (p. 401); Cotton Compress & Warehouse Ass'n (p. 335); machinery manufacturers (pp. 196, 615); gas companies (pp. 195, 618); plasterers, lathers and other building trades and general contractors (pp. 194, 610, 616); theaters (p. 194); candy makers (p. 605); sand and gravel and concrete mix (p. 605); printers (p. 613); paper manufacturers (p. 614); orchardists (p. 616); glass manufacturers (p. 621); ropes makers (p. 627); garment manufacturers (p. 629); grocery companies (p. 628).

June 1947. Not less than 200 additional suits were instituted shortly after the decision of the Court of Appeals for the Second Circuit, in the *Aaron* case.

(e) The Senate Subcommittee held extended hearings resulting in a record of 826 printed pages. They heard at length from employers and employees and Government officials; from counsel for plaintiffs in the pending East and West Coast longshoremen cases; and from representatives of C.I.O., A.F.L. and International Longshoremen's Association; and received a large amount of documentary material.

(f) There was no opposition to an amendment having prospective operation. Retroactivity "was opposed principally by counsel for claimants who have instituted suits to recover so-called 'overtime on overtime' ", and by C.I.O. A.F.L. did not oppose. The International Longshoremen's Association "strongly suggested the need of such relief". The bill originally had been limited to longshoring and the construction trades. There was "no serious objection" to broadening the bill to cover industry generally (S. Rep. 402, pp. 2-3).

(g) The reasons for the retroactive provision which were regarded by the committee as impelling include all those stated in Section 1 of the Portal Act as the basis for that legislation—namely, windfall payments in derogation of bona fide collective-bargaining agreements; the inequity of penalizing employees who stood by their agreements, and employers who acted in good faith; the fact that the claims sprang from the wartime exigencies; the absence of notice from the Wage

and Hour Administrator that the practices were illegal; the filing of suits deplored by A.F.L.; and the serious financial consequences of a failure to legislate. The committee concluded that "the overtime-on-overtime claims cannot be distinguished from the claims covered by the Portal-to-Portal Act". (S. Rep. 402, pp. 7-10.)

(h) It was the intent of Congress to destroy pending overtime-on-overtime claims in the longshore industry and in other industries under similar contracts and practices. (S. Rep. 402. See also debate on concurrence in the House of Representatives set forth in Congressional Record July 14, 1949, pp. 9670, 9671, 9674, 9677, 9679.)

(i) In response to an inquiry from the Committee, Mr. McComb, the present Wage and Hour Administrator, stated (Hearings before Subcommittee, p. 291):

> "The position of the former Administrator with respect to premium rates of time and one-half for work performed on holidays, Saturdays, or Sundays was that such premiums were overtime pay and could be offset against any amounts required to be paid for overtime work by the Fair Labor Standards Act."

(j) The 1947 Annual Report of the Wage and Hours Public Contracts Division of the Department of Labor contained the following statement (Hearings before Subcommittee, p. 494):

> "There are many other supplementary pay arrangements, however, which do not appear to undermine the overtime requirements of the act

and which are considered advantageous by both management and labor. These include certain types of profit-sharing plans and arrangements for time and one-half pay or better for work during specified hours of the day, or days of the week. The very purpose and desirability of such pay arrangements are frequently defeated by the requirement that such payments must be included in the regular rate of pay in computing overtime compensation. Some modification of the term 'regular rate of pay' appears to be necessary to permit the utilization of such arrangements in industry within the framework of the Fair Labor Standards Act without at the same time opening the gates for the widespread evasion of the intent of Congress."

(k) On February 18, 1949, the Secretary of Labor wrote the Committee in part as follows (Hearings before Subcommittee, p. 2):

"The Department of Labor favors prompt enactment of legislation such as is contained in S. 336 in order to remove serious difficulties in the maintenance of desirable labor standards arrived at through collective-bargaining agreements, and in order to prevent labor disputes in the industries affected by the proposed legislation. Expeditious action on this measure is necessary at this time in order to eliminate the imminent possibility that such disputes may occur when existing temporary arrangements in the longshore and stevedoring industries to meet the problem expire."

In the face of the foregoing, it is hard to see how any Court could question the sincerity or correctness

of the Congressional finding that enactment of P.L. 177 was necessary "to relieve and protect interstate commerce from practices which burden and obstruct it." Surely it cannot be said that there was no "reasonable relationship" between the existing situation and the well-being of interstate commerce. This being so, there is an end to the power of the Court to further consider or review the justification for the legislation.

We turn now to discussion of the basic issue of the constitutional limits of Congressional legislative power.

We believe that the problem has been confused at times by arguments which deal with the matter as one of confiscation of rights, when in reality no confiscation is involved.

There are a host of cases making it too clear to be questioned any longer that the exercise of sovereign powers in a manner not involving an outright taking of property for Government use is not precluded by the fact that there will result a disruption of existing contractual arrangements or even a complete destruction of the benefits or value of contracts. See, for example, imposition of maximum prices on sales of coal in *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381; taking possession and operation of telegraph lines when deemed necessary for the national defense in *Dakota Central Telephone Co. v. South Dakota,* 250 U.S. 163; the suspension of tariff provisions upon findings that the duties imposed by a foreign state are reciprocally unequal and unreasonable in *Field v. Clark,* 143 U.S. 649; the regulation of radio stations

according to public interest, convenience and necessity in *National Broadcasting Co. v. United States,* 319 U.S. 190; the prohibition of "unfair methods of competition" not defined or forbidden by the common law in *Federal Trade Commission v. Keppel & Brother,* 291 U.S. 304; and the allocating of marketing quotas among the states and producers in *Mulford v. Smith,* 307 U.S. 38; imposition of price controls under the Price Control Act of 1942, in *Yakus v. United States,* 321 U.S. 414; nullification of gold clause provisions in corporate bonds, as a result of regulation of the currency, in *Norman v. B&O RR Co.,* 294 U.S. 240; the imposition of a moratorium on foreclosure of mortgages in *Home Bldg. & Loan Ass'n. v. Blaisdell,* 290 U.S. 398.

The controlling doctrine is stated by Justice Holmes in *Omnia Co. v. United States,* 261 U.S. 502. In that case the plaintiff had a valuable contract for delivery to him of the entire output of a particular plant, and the contract was wholly nullified by the taking over of the plant by the United States for war purposes. In denying a recovery for the resulting loss the Court said, at page 508:

> "The contract in question was property within the meaning of the Fifth Amendment, and if taken for public use the Government would be liable. But destruction of, or injury to, property is frequently accomplished without a 'taking in the constitutional sense' ".

At page 510 the Court said:

> "For the consequential loss or injury resulting from lawful governmental action, the law affords

no remedy. The character of the power exercised is not material."

At pages 509-510 the Court quoted with approval the following statements from *Louisville & Nashville R.R. Co. v. Nottley,* 219 U.S. 467, 484:

"It is not determinative of the present question that the commerce act as now construed will render the contract of no value for the purposes for which it was made. In *Knox v. Lee,* 12 Wall. 457, above cited, the court, referring to the Fifth Amendment, which forbids the taking of private property for public use without just compensation or due process of law, said: 'That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war, may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of the contracts."

In *Norman v. B&O RR, supra,* the Court, at page 305, approved the conclusions reached in the legal tender cases, "that contracts must be understood as having been made in reference to the possible exercise of the rightful authority of the Government, and that no obligation of a contract 'can extend to the defeat' of that authority", and that the Fifth Amendment referred only to a "direct appropriation". Passing on to the contention that "Congress is seeking not to regu-

late the currency, but to regulate contracts, and thus has stepped beyond the power conferred", the Court said, at pages 307-308:

> "This argument is in the teeth of another established principle. Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them."

In many of the foregoing cases the rights which are interfered with, impaired, or destroyed existed under, and had all the sanctity which attaches to, private contracts. If such rights may be thus affected by exercise of sovereign powers, how much clearer is the power to interfere where, as in the present case, the asserted rights had no independent contractual origin, but had been created solely by an act of the sovereign and therefore presumably could be modified or withdrawn by the sovereign.

That rights created by statute, when not perfected by final judgment, may be destroyed by repeal or modification of the statute was decided in *Coombes v. Getz,* 285 U.S. 434, 447, 448; *Flannigan v. Sierra,* 196 U.S. 553, 560; and *Battaglia v. General Motors* (CCA 2), *supra.* The Supreme Court has clearly indicated its view that rights under F.L.S.A. fall into this category. In *Brooklyn Bank v. O'Neill,* 324 U.S. 697, they were described as "statutory rights con-

ferred on private parties, but affecting the public interest"; and as "private rights created by federal statute" (pp. 704-705). The refusal of the Court to validate releases was for the very reason that the rights were not subject to control by contract (pp. 707, 708). The right to liquidated damages was said to be merely one part of an entire remedy; and one section, 16(b), was said to "create the obligation for the entire remedy" (p. 711). At page 709 the rights of employees were described as of a "private-public character", and the Court said that "although this right to sue is compensatory, it is nevertheless an enforcement provision", in aid of attainment of the objectives of the Act.

The protection of rights fixed by final judgments is based on the policy of necessary repose and quieting of litigation and respect for the judicial branch—considerations which are not present in the present case. It is also to be noted that there is no basis for a claim that plaintiffs' rights have become "vested" because of an equity arising from a change of position in reliance on F.L.S.A. or its interpretation by the Wage and Hour Administrator or the Courts. The employment arrangement was made in the belief of both sides that it complied with F.L.S.A. In other words, it was not modified to incorporate F.L.S.A. provisions. At page 9 of Senate Report 402, attention was called to the fact that all that P.L. 177 really did was to affirm and validate contracts which were acceptable to the parties and which had been interfered with by the construction placed on them by the Supreme Court.

The constitutional power to modify F.L.S.A. surely can be no weaker than the power to superimpose F.L.S.A. on existing contracts at the time of its enactment and thus change existing rights and obligations. In *United States v. Darby,* 312 U.S. 100, and *Opp Cotton Mills v. Administrator,* 312 U.S. 126, the constitutionality of F.L.S.A. was upheld against charges that it violated the Tenth Amendment and the due process clause of the Fifth Amendment, and was an unconstitutional delegation of legislative power to the Administrator. The constitutional question arose again in *Overnight Motor Co. v. Missel, supra,* where an unsuccessful attempt was made to restrict the application of the statute to minimum wages and hours necessary to good health of employees. The refusal of the Court in *Brooklyn Bank v. O'Neill, supra,* to recognize the validity of settlements and releases for amounts less than the Act called for was an interference with the contracting rights of the parties. Thus the Act interfered with existing contracts in its inception. Since this is lawful, it must be equally lawful to interfere with the relationships which follow the passage of the Act. See, to this effect, the statement at page 577 in the *Missel* case, *supra,* that private contracts, whether before or after the passage of legislation, cannot take overtime transactions from the reach of dominant constitutional power. The subject matter is at all times within the control of the Congress.

CONCLUSION.

For all the foregoing reasons, we think it is clear that the Supreme Court has made repeated pronouncements which indicate that its denial of certiorari in the Portal Act cases was because it believed the Circuit Court rulings as to its constitutionality were correct; and that the same reasoning supports the constitutionality of P.L. 177 and P.L. 393.

Dated, August 30, 1950.

Respectfully submitted,

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